orig

ORIGINAL
FILE

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

REPLY COMMENTS OF TIME WARNER INC.

Fleischman and Walsh
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

June 25, 1992

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

REPLY COMMENTS OF TIME WARNER INC.

INTRODUCTION

Time Warner Inc. ("Time Warner") hereby submits its Reply Comments in response to the Commission's Notice of Proposed Rulemaking[1/] ("Notice") in the above-captioned proceeding. As we described in our comments in this proceeding, Time Warner is a world leader in the field of media, information, and

---

1/ Notice of Proposed Rulemaking in CC Docket No. 92-90, released April 17, 1992.

entertainment, notably magazine publishing, motion pictures, television series production, records, books, and cable television. Time Warner is also one of the nation's largest telemarketers. In addition to the fact that Time Warner's interests could be vitally affected by any Commission action in this proceeding, Time Warner also respectfully urges the Commission to consider the effects of such action on the private telemarketing industry and the U.S. economy as a whole.

SUMMARY

Throughout this proceeding, Time Warner has urged the Commission to keep in mind that the Telephone Consumer Protection Act of 1991 ("TCPA") was never intended to render all homes free from all telemarketing, but rather, was enacted to address very specific concerns. Congress' main concern was not live calls, whether or not assisted by automatic dialing devices, but rather artificial or prerecorded voice calling, which seizes telephone lines, allows no communication between caller and callee, and does not free the telephone line at the request of the callee.

Many commenters agreed with Time Warner's positions, which largely reflected the tentative conclusions reached in the Notice. They, too, argued that in-house suppression is cheaper, more efficient, and less intrusive than other regulatory options, especially a federally-mandated national

database of "do not call me" names. Even more important, in-house suppression would not require a giant new federal bureaucracy, as would a new national database.

The idea of a federally-mandated national database, which the Notice questioned, was roundly criticized. Commenters agreed that it could not be kept up to date, it would cost too much, especially for small businesses, it would be difficult to implement, administer, and enforce, and it would intrude upon the privacy of the very people it seeks to protect. A directory marking regulation would suffer from many of the same problems as a national database, and some additional ones as well, such as the need to search through multiple telephone books in many areas of the country. Proponents of this option failed to suggest a feasible plan for its nationwide implementation.

Commenters also agreed that a flexible definition of "established business relationship" ("EBR") was intended by Congress and is critical for telemarketers. Time Warner submits that Congress intended to define EBR in terms of a reasonable determination by the telemarketer that a consumer would not consider a telephone call to be an intrusion on his or her privacy, because the product or service was reasonably related to a previous transaction with the company, and the time frame was also reasonable for the particular situation. Inflexible definitions of EBR, such as a rigid time frame, would unnecessarily stifle the development of new products and services, contrary to the intent of Congress and President Bush.

Many commenters in addition to Time Warner seized upon the use by the TCPA's legislative history and in the Notice of the terms "artificial or prerecorded voice," "ADRMPS," "autodialer," and "automatic telephone dialing system." These commenters agreed that the terms appear to have been confused. The TCPA specifically bans telephone calls to residences using artificial or prerecorded voices, but does not ban the use of automatic telephone dialing systems or other automated dialing devices in conjunction with live operators in calls to residences. This distinction is critical, and Time Warner respectfully urges the Commission to reflect these precise statutory distinctions in its rules. Commenters who argued otherwise, i.e., that automatic telephone dialing systems or live calls to residences are prohibited, have clearly misread the TCPA.

While the TCPA contains some language regarding the ability of states to continue to regulate intrastate telemarketing calls, Time Warner respectfully reminds the Commission that it may still preempt areas of state regulation that would thwart the national telecommunications policy expressed by Congress in enacting the TCPA. Many states have statutes regulating various aspects of telemarketing, including restrictions on the use of automatic dialing-announcing devices ("ADADs") and time of day restrictions on telemarketing calls. These statutes, all different from one another, create a patchwork quilt of differing regulations which may conflict with many provisions of the TCPA. Accordingly, the Commission

must address this potential problem and exercise its preemption authority where needed, unless it can successfully urge the states to conform their statutes to the TCPA.

I. IN-HOUSE SUPPRESSION IS THE MOST ACCEPTABLE METHOD TO PROTECT PRIVACY RIGHTS

Section 3(c)(1)(A) of the TCPA requires the Commission to "compare and evaluate alternative methods and procedures . . . for their effectiveness in protecting such privacy rights, and in terms of their costs and other advantages and disadvantages."[2/] The Notice sought comment on the alternatives named in the TCPA, as well as any additional methodologies.[3/] Time Warner's comments noted that in-house suppression (i.e., a corporate list of "do not call" names), is widely used by the company and is an effective and efficient method of protecting telephone subscriber privacy rights. Specifically, we explained that utilizing in-house suppression to target calls only to residents who wish to receive such calls makes good business sense and furthers customer relations.[4/]

2/ 47 U.S.C. §227(c)(1)(A) (Supp. 1991).

3/ Notice at ¶27.

4/ Comments of Time Warner at 9-11.

Many other commenters similarly recited the many benefits of reliance, for the most part, on in-house suppression. According to these commenters, in-house suppression has the significant advantage of allowing consumers the flexibility to choose which telephone solicitations they wish to receive.[5/] It also avoids confidentiality problems that would arise under other regulatory alternatives such as a federally-mandated national data base, where consumers would have to place their name, telephone number, and possibly other personal identification on a list that would be accessible to thousands of businesses.[6/] Moreover, in-house suppression "places the full responsibility for being responsive to consumer concerns squarely on the telemarketer."[7/] This responsibility includes the cost of compliance with Commission regulations, which would be borne by individual telemarketers. Finally, it was pointed out that in-house suppression lists can be updated on a frequent basis at a lower cost and with better results than other methods of regulation.[8/]

5/ Comments of Citicorp at 23-27.

6/ Comments of the American Telemarketing Association, Inc. at 2. This privacy problem would be especially irksome in a national database, where the very people who are sensitive about their privacy and who wish not to be called by telemarketers would, ironically, have to publicize personal information about themselves to thousands of businesses.

7/ Comments of Association of National Advertisers, Inc. ("ANA") at 6.

8/ Comments of Gannett Co., Inc. ("Gannett") at 6-7. See also Comments of MCI Telecommunications Corporation ("MCI") at 4-5.

The critics of in-house suppression offered unsupported concerns. For instance, the Utilities Telecommunications Council claimed that in-house suppression would be difficult to enforce, but failed to discuss any possible enforcement methods.9/ Citicorp, on the other hand, proposed that companies be required to have a written policy implementing in-house suppression, to be used as a certification of compliance with federal requirements pursuant to the TCPA.10/ Moreover, as both Citicorp and Time Warner pointed out, the TPCA's own enforcement mechanisms, including provisions for private rights of action and Commission-instituted causes of action, will keep telemarketers in line.11/

Consumer Action criticized in-house suppression, stating that it would force the consumer to notify every single company that might potentially call.12/ However, it is a gross exaggeration to say that residents would be forced to call all potential telemarketers. In fact, consumers would never need to initiate a call to a telemarketer. They would need only to

---

9/ Comments of the Utilities Telecommunications Council ("UTC") at 9.

10/ Comments of Citicorp at 25-27. See also Comments of the Direct Marketing Association ("DMA") at 16-17.

11/ See, e.g., Comments of Citicorp at 27; Time Warner at 17. Time Warner discussed the TCPA's enforcement mechanisms in the context of established business relationships, but the point -- that such mechanisms are effective both as deterrents and to redress consumer complaints -- is the same in the in-house suppression context as well.

12/ Comments of Consumer Action at 13.

communicate one time with the company in order to be placed on the suppression list. Such communication could occur when the company calls the resident, or if the resident is responding in writing to a written advertisement by the company, etc. Potential telemarketers who never call a resident obviously are not annoying or invading the privacy of that person. Moreover, other commenters submit that it is, in fact, a major advantage to the consumer to be able to communicate with individual companies, as well as the best way to avoid regulatory overkill.[13/] Based on Time Warner's experience, consumers appear to prefer the ability to communicate their desires to individual companies rather than the blanket "all or nothing" approach of a national database or similar alternative.[14/]

Some groups, primarily those such as Avon, Amway, and the Direct Selling Association, who represent sales forces comprised of individuals who often call from home, claimed that in-house suppression would involve significant costs in distributing to each individual sales agent lists of names of people who do not wish to be called.[15/] Certainly any regulation in the area of telephone solicitation will involve significant costs. However, as pointed out by several

---

13/ See, e.g., Comments of the DMA at 12-13; Citicorp at 23; Olan Mills, Inc. ("Olan Mills") at 8.

14/ See also Comments of Olan Mills at 14-15; J.C. Penney Company, Inc. ("J.C. Penney") at 20-21.

15/ See, e.g., Comments of Amway Corporation ("Amway") at 3; Avon Products, Inc. ("Avon") at 2; Direct Selling Association at 3.

commenters, in-house suppression, which is already used by a considerable number of companies, will be a more cost-efficient alternative than other types of regulation, especially a federally-mandated national database, which could involve the creation of a giant new federal regulatory bureaucracy.16/

II. THE NATIONAL DATABASE CONCEPT WAS WIDELY CRITICIZED

The Notice asked for comments concerning the desirability of a federally-mandated national database of "do not call me" names, while raising questions regarding the cost, accuracy, and privacy problems inherent in such an option.17/ Almost universally, the commenters were also concerned with the cost of implementing such a system and the difficulty in keeping it current and accurate.

A. There Would be High Costs Involved in the Implementation of a National Database.

It has been estimated that to implement a new national database would cost an initial $70 million, and an additional

---

16/ See, e.g., Comments of Citicorp at 23; Olan Mills at 8. To the extent that the Commission desires to avoid undue impact on those companies that employ calling from the home, as is the practice with companies such as Avon and Amway, in-house suppression requirements for companies that do only in home calling could be reduced. Moreover, to the extent that in-house suppression would be costly to small businesses (as would any regulatory alternative), the Commission may wish to consider the proposal put forth by J.C. Penney, whereby small businesses could choose another option, such as subscription to the DMA's TPS list to fulfill the in-house suppression rules.

17/ Notice at ¶¶28-29.

$20 million a year to keep it operational.[18] The high costs involved in implementing such a system and keeping it up to date is certainly a primary reason for rejecting the federally-administered national database approach. Small businesses would especially be adversely affected by this system. The TCPA prohibits the Commission from placing "an unreasonable financial burden on small businesses" in establishing a national data base.[19] However, significant costs would accompany the purchase of the computer system to utilize a computerized database or the time involved with checking each number against a paper record. Either possibility would make the cost of running a small business prohibitive, and many small telemarketers would choose to go out of business.[20] Unless the database could somehow be subdivided into smaller parts either geographically or otherwise, companies that undertake only limited telemarketing either in terms of geographic area, volume of calls, etc. would likely be required to contribute financially on an equal level with nationwide telemarketers by having to purchase the same

---

18/ Hearing on S.1410, S.1462, S.857 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science & Transportation, 102d Cong., 1st Sess. 3 (1991) (statement of Alfred C. Sikes, Chairman, FCC).

19/ 47 U.S.C. §227(c)(4)(B)(iii).

20/ Comments of the DMA at 25; Avon at 2.

database list.[21/] The costs of telemarketing would likely outweigh the benefits to the company.[22/]

Larger organizations anticipate a huge increase in expenses as well. These expenses are expected to come from the organization put in control of the database, enforcement, subscription and upkeep.[23/] Thus, the Association of National Advertisers and the Securities Industries Association are understandably concerned about costs to member companies.[24/]

Even those entities who support a federally-mandated national database -- generally state agencies, certain consumer organizations and some telephone companies -- acknowledge that there will be great costs involved in its implementation. The proponents of such a national scheme all suggest that someone other than themselves should shoulder these expenses of the national database, namely telemarketers.[25/] The consumer groups also agree that all costs should be the exclusive

---

21/ Comments of Olan Mills at 13; Amway at 2.

22/ See Comments of Gannett at 6.

23/ Comments of DMA at 24. See also Comments of American Express at 10; Sears at 4; Citicorp at 28; Merrill, Lynch and Co., Inc. ("Merrill, Lynch") at 3-4.

24/ See Comments of the ANA at 4; Securities Industries Association ("SIA") at 5.

25/ See Comments of the New York Public Service Commission at 1; Pacific Telesis at 11; Ohio Public Utilities Commission at 6; Pacific Telesis at 1; United States Telephone Association at 3; U.S. West Communications ("U.S. West") at 8-9.

responsibility of the telemarketers.[26/]

As pointed out above, the Commission cannot implement a scheme that places unreasonable financial costs on small businesses. The TCPA also requires that there must not be any costs to consumers if the FCC implements a national database.[27/] The Notice states that "any database would not be a government sponsored institution and would not receive federal funds or a federal contract for its establishment."[28/] Similarly, President Bush, in his statement in signing the TCPA into law, indicated his desire that "the requirements of the Act are met at the least possible cost to the economy."[29/] Therefore, the admitted high costs of this option must flow to consumers, even if not directly through increased taxes or fees. As in any business, if telemarketers' costs increase, those costs will be passed on to consumers in the form of higher prices. Moreover, as Time Warner pointed out in its comments, it could likely result in less consumer choice when telemarketers either scrap products or go out of business.[30/]

26/ Comments of Consumer Action at 2; Privacy Times at 2.

27/ 47 U.S.C. §227(c)(3)(E).

28/ Notice at ¶29.

29/ President's statement on signing the TCPA, December 20, 1991.

30/ Comments of Time Warner at 25-26.

B. A National Database Will be Difficult to Keep Accurate and Up to Date.

Fifty percent of the population of The United States moved between 1985 and 1990; 18 percent move every year.[31/] According to one commenter, one regional phone system of 10 million customers has estimated that it makes 30,000 changes a day.[32/] Statistics like these exemplify the near impossibility of keeping a national database accurate.

Unless this database had the capability to be updated and forwarded to each telemarketer every day, there would be considerable lag time before a consumer's name appeared on the database.[33/] When people move, their preference would not immediately follow until the new list became available.[34/] If the database were on paper, this would require new copies throughout the year.[35/] These copies would be obsolete before they even came out. If the database were on computer, disks would have to be distributed throughout the year at great expense to the telemarketers. In addition to obsolescence, the technology costs would be huge. If the database were to be updated through a computer network, the technology would be prohibitively expensive, especially for small businesses.

31/ See Comments of DMA at 22 citing Felicity Barringer, "Census Reflects Restless Nation," New York Times, Dec. 20, 1991, at A16.

32/ Comments of Avon at 2.

33/ Notice at ¶28.

34/ See, e.g., Comments of Merrill, Lynch at 3.

35/ See Comments of Amway at 2.

In-house suppression, on the other hand, would alleviate many of these problems. As both MCI and Gannett point out, updated information regarding changes of address, etc. can be filtered through a company's computer system in a relatively short time. In MCI's case, the in-house suppression list is updated weekly. This would be simply impossible to do in a federally-mandated national data base or other similar regulatory alternative.36/

The problems of high cost and inaccuracy would be increased through the necessary establishment of some entity to oversee the database. One commenter suggests that if the federal government were to contract with a private entity to do this, there could be antitrust problems.37/ If so, the entity with oversight responsibilities must be a governmental or quasi-governmental one with the attendant administrative costs involved in financing such governmental bureaucracy.

III. DIRECTORY MARKINGS SUFFER FROM MANY OF THE SAME PROBLEMS AS A FEDERALLY-MANDATED NATIONAL DATABASE AND SOME ADDITIONAL ONES AS WELL

Despite specific Commission inquiry, commenters could not describe a feasible nationwide directory marking system.38/ Problems associated with the federally-mandated national database alternative similarly exist with directory markings.

36/ See Comments of MCI at 3-5; Gannett at 6-7.

37/ Comments of J. C. Penney at 23.

38/ See Comments of Consumer Action at 12; Public Utilities Commission of Ohio at 7; DMA at 28; MCI at 6; SIA at 8.

For instance, both suffer from tremendous costs, inaccuracy and administrative burdens.[39/] Additionally, both only protect consumers from certain types of calls.[40/] Furthermore, as is the case with a federally-mandated national database, while the additional costs involved in implementing a directory marking system could be at least partially borne by those who publish telephone directories, the telephone companies argue that they should not be required to support whatever system is implemented.[41/] The cost will fall to the telemarketers once again with all the disadvantages associated with the federally-mandated national data base.

Moreover, a directory marking system would be even more inaccurate than a national database. Directories are updated once a year.[42/] Inherently a greater lag time would occur in updating information and thus, greater dissatisfaction with the system would result.

Directory markings, unlike the national database, would additionally require telemarketers to check every individual telephone directory. This could mean potentially thousands of directories as the states each have many directories.

39/ See Comments of American Express at 14-15.

40/ Telephone solicitations from charitable and political organizations would be exempt. See 47 U.S.C. §227(a)(3)(C). Thus, expectations that a national database will create homes free from all telephone intrusions are a myth.

41/ See Comments of Pacific Telesis at 14; U.S. West at 13.

42/ Comments of U.S. West at 13.

Moreover, often competing companies put out several directories within each region. As the comments from Merrill Lynch point out, the burdens felt by national, regional and local telemarketers in having to check all such directories would be tremendous:

> [A] difficulty arises where a community is served by more than one phone book, both as to the necessity of a requirement that all competing phone book providers use special markings, and the necessity for all telemarketers to be sure that all available phone books were checked for each number called. [Telemarketers] who prospect outside of one community, which is the rule rather than the exception, would be required to maintain a large volume of phone books with overlapping coverages. The very process of checking and crosschecking such an unwieldy resource is prohibitively time-consuming, and full compliance is hard to assure.43/

Additionally, consumers with unlisted phone numbers would not be able to have a directory marking next to their number in the phone book.44/ These individuals have made a special effort to increase their privacy, and now will have to choose between being unlisted or being marked in the directory.

If the directory marking system were to be implemented, absent a uniformity requirement imposed by the FCC, each state and each locality could have different laws. This would create an administrative nightmare for telemarketers required to comply with an inordinate number of different directory marking systems. Time Warner voluntarily tried to obtain the list of Florida residents who had submitted their names to the

---

43/ Comments of Merrill, Lynch at 4.

44/ Comments of Bell Atlantic at 6.

statewide "do not call" list in order to comply with the Florida asterisk law. However, Time Warner encountered great difficulties in trying to obtain the necessary computer software containing such names, and thus could not implement the law. Encountering problems like these in every state, with every different directory and locality, would make the TCPA utterly useless in furthering protection of consumers.

IV. A FLEXIBLE DEFINITION OF "ESTABLISHED BUSINESS RELATIONSHIP" IS CRITICAL FOR TELEMARKETERS

As Time Warner and other commenters explained, the TCPA's legislative history evidences a clear congressional intent to define "established business relationship" ("EBR") in a manner that allows telemarketers flexibility to develop and market related products to its consumers.[45/] As commenters recognized, an inflexible definition of EBR would lead to serious disagreements which could have the effect of stifling the development of new products.[46/] As commenters suggested, the Commission's definition of EBR should reflect Congress's intent to allow telemarketing by a company or its subsidiaries of related products, over a relevant time frame, so long as the company reasonably determines that the customer would not find

---

45/ See, e.g., Comments of Time Warner at 12-16.

46/ See, e.g., Comments of J.C. Penney at 7; Sears, Roebuck & Co. ("Sears") at 5-6.

his privacy violated by such call.[47/]

Critics of a flexible EBR definition, on the other hand, have proposed definitions of EBR which are far stricter than that called for by the TCPA and which would effectively negate the protection offered established business relationships in the statute. For instance, Privacy Times suggests that the Commission should require businesses in separate mailings or other communications to obtain express written consent from customers before telemarketing to them.[48/] This requirement would relegate all calls to "cold calls" if written consent were required of even valued customers before a company could call them. Neither the statutory language nor even the legislative history makes mention of any congressional intent that telemarketers seek written consent from customers before an EBR can be solidified. Indeed, if such written communications were practicable and effective, companies would not need to use the telephone for marketing. However, as Time Warner described extensively in its comments, direct mail is often an ineffective means of communicating with customers.[49/] In fact, based on Time Warner's experience, many customers would not respond to or even read complicated consent forms that are mailed to them.

47/ See, e.g., Comments of Time Warner at 12-17; Sears at 5-6; J.C. Penney at 8.

48/ Comments of Privacy Times at 4.

49/ Comments of Time Warner at 25-26.

Consumer Action suggests that an established business relationship must be defined as one held together by a contract or similar arrangement resulting from the purchase of a product or service within the past year.[50/] Once again, however, this suggestion exceeds the intent of Congress. The House Report specifically cites allowable EBR telephone calls that do not involve a contract or consideration.[51/]

In short, the Congress gave the Commission the ultimate responsibility to define EBR. The legislative history evidences that Congress did not intend a definition of EBR that would stifle the telemarketing industry:

> The Committee recognized this [established business] relationship so as not to foreclose the capacity of businesses to place calls that build upon, follow-up, or renew, within a reasonable period of time, what had once been [an] 'existing customer relationship.' For example, [a] magazine publisher would be able to call someone who had let their subscription lapse. A person who recently bought a piece of merchandise may receive a call from the retailer regarding special offers or information on related lines of merchandise. A loan officer or financial consultant may call a telephone subscriber who had requested a loan or bought auto insurance a couple of months ago to pitch new loan offerings or other types of insurance.[52/]

The clear intent of Congress was to adopt a flexible definition of EBR broad enough to encompass substantially

---

50/ Comments of Consumer Action at 6. Similarly, U.S. West would require an exchange of consideration. Comments of U.S. West at 3.

51/ H.R. Rep. No. 1304, 102d Cong., 1st Sess. 14 (1991).

52/ Id. at 14-15.

related products offered to prior or existing customers during relevant time periods. Time Warner submits that an EBR should be deemed to exist where the party engaging in the telemarketing has reason to believe that a consumer would not consider it an intrusion on his privacy to be advised of the product or service which is the subject of the telephone call. Of course, the telemarketer's judgment would have to take into account whether the products or services were reasonably related, and whether the time frames were reasonable, depending on the particular situation. This standard is totally consistent with congressional guidance to the Commission regarding the definition of EBR to properly reflect a reasonable balance between the privacy interests of telephone subscribers and the legitimate speech and business interests of telemarketers.[53/]

V. TIME WARNER REITERATES THE NEED FOR CLARIFICATION THAT THE TCPA PROHIBITS ONLY ADRMP SYSTEMS, NOT AUTODIALERS USED BY LIVE OPERATORS, IN CALLS TO RESIDENCES

The TCPA states:

> It shall be unlawful for any person within the United States --
>
> * * *
>
> (B) to initiate any telephone call to any residential telephone line <u>using an artificial or prerecorded voice</u> to deliver a message without the prior express consent of the called

---

53/ See TCPA, Sec. 2(9); H.R. Rep. No. 1304, at 13.

> party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).[54/]

Thus, it is the use of an automatic dialing recorded message player ("ADRMP") for artificial or prerecorded voice calls to residences that is prohibited. However, as Time Warner and other commenters explained, both the legislative history and the Notice use the terms "ADRMP," "artificial or prerecorded voice," "automatic telephone dialing system," and "autodialer" interchangeably when in fact these terms are treated very differently under the TCPA. An "automatic telephone dialing system" as defined by the TCPA is a device that is used to store telephone numbers and automatically dial them using a random or sequential number generator.[55/] The Notice uses "autodialer" as a synonym for "automatic telephone dialing system."[56/] Thus, an automatic telephone dialing system or an autodialer has absolutely nothing to do with the use of an artificial or prerecorded voice to make a telephone call. Other commenters spotted the confusion surrounding the terms and reacted with similar concern.[57/] Accordingly, Time Warner respectfully urges care in the use of these similar sounding but very different terms as the Commission writes its rules.

54/ 47 U.S.C. §227(b)(2)(B) (emphasis added).

55/ 47 U.S.C. §227(a)(1).

56/ Notice at ¶2.

57/ See, e.g., Comments of DMA at 9; American Express at 7; Citicorp at 6-8.

This distinction must be kept especially clear in implementing the prohibition on certain calls to residential telephones using an artificial or prerecorded voice.[58/] The prohibition has nothing to do with automatic telephone dialing systems or autodialers, and the inadvertent use of such terms should be avoided. In noting the distinction between automatic telephone dialing systems and artificial or prerecorded voice calling, it should be highlighted that the TCPA does not ban live operator residential calling using automatic telephone dialing systems, as defined by the TCPA, or other types of automated dialing.[59/]

Moreover, the TCPA's definition of "automatic telephone dialing system" refers to equipment used for number storage and random or sequential dialing. We note here that the TCPA's legislative history clearly described what it meant by the term "random or sequential" dialing:

> Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers. Once a phone connection is made, automatic dialing systems can 'seize' a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an

---

58/ 47 U.S.C. §227(b)(1)(B).

59/ See Comments of Time Warner at 22-24.

emergency, potentially dangerous as well.60/

Obviously, by "random or sequential dialing," Congress meant completely random calling starting at one number and merely increasing a digit at a time, with no selection by the caller to determine who is being called. Such calling inevitably reaches unlisted telephone numbers, hospitals and other emergency numbers, and many other parties who not only do not wish to be called, but who are in no position to purchase a product over the telephone. Indeed, the Utilities Telecommunications Council appears to use the same definition of "sequential dialing" as the House Report where the UTC states that:

> Automated equipment has been used to sequentially dial every direct inward dial (DID) extension in some utilities, resulting in every phone ringing in sequence until answered. . . . Similarly, utility dispatch personnel often use consoles to which blocks of DID numbers are programmed. The sequential dialing patterns of automated dialing equipment necessitate the dispatcher answering each call.61/

Obviously, random and sequential dialing involves no selection by the telemarketer to narrow the range of names

---

60/ H.R. Rep. No. 1304, at 10. Although the TCPA defines "automatic telephone dialing system" in terms of the capacity for random or sequential dialing, the legislative history makes clear that it is only the use of such capacity that could cause problems. Moreover, the states may only regulate "the use of automatic telephone dialing systems." 47 U.S.C. §227(e)(1)(B).

61/ Comments of the UTC at 7.